

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

ALVIN BALDUS, ET. AL

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE,
and RONALD KIND,

Intervenor-Plaintiffs,

v.

Case No. 11-CV-562
JPS-DPW-RMD

Members of the Wisconsin Government Accountability
Board, each only in his official capacity: et, al
Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI,
PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

VOCES DE LA FRONTERA, INC., et al
Plaintiffs,

v.

Case No. 11-CV-1011
JPS-DPW-RMD

Members of the Wisconsin Government Accountability
Board, each only in his official capacity: et, al

Defendants.

**INTERVENOR-PLAINTIFFS RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

I. THE BASIC AIM OF LEGISLATIVE APPORTIONMENT IS TO ACHIEVE FAIR AND EFFECTIVE REPRESENTATION FOR ALL CITIZENS.

The Defendants argue that the U.S. Constitution does not mandate core retention, compactness nor communities of interest. (Motion for Summary Judgment Brief, Dkt. 129, p. 3.) The Defendants principally rely upon *Gaffney v. Cummings*, 412 U.S. 735,752 (note 18). Note 18 states “compactness or attractiveness has never been held to constitute an independent constitutional requirement for legislative districts.”

Likewise regarding communities of interest the Defendants cite *Graham v. Thornburgh*, 207 F. Supp. 2d 1280 (D. Kan. 2002). *Graham* recognizes that “preserving communities of interest is a legitimate and traditional goal in drawing congressional districts.” *Id.* at 1297. However, that does not mean that there is an individual constitutional right to have one’s community of interest contained in a legislative district. *Id.* This was also the result in *Gorrell v. O’Malley*, 2012 WL 226919 (D.Md. Jan 19, 2012), also cited by Defendants.

The Intervenor-Plaintiffs agree with these holdings. None of these acknowledged important redistricting considerations create an independent constitutional requirement. However, that does not end the constitutional inquiry.

The basic aim of legislative apportionment is achieving fair and effective representation for all citizens.

More fundamentally, *Reynolds* recognized that “the achieving of fair and effective representation for all citizens is...the basic aim of legislative apportionment,” *Gaffney v. Cummings*, 412 U.S. 735,748, (1973) (relied on by the Defendants). Fair and effective representation for all citizens is a right derived from the equal protection clause of the 14th Amendment to the Constitution. Any person denied fair and effective representation by a redistricting plan has a constitutional claim based upon equal protection.

Furthermore, *Gaffney* warns:

An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.

Id. at 749.

The losing argument in the above cases was that the parties attacking the redistricting plan based the attack on a single redistricting principle. Since there are several redistricting principles no single one could be elevated to a constitutional requirement because no one principle necessarily determines fair and effective representation. Furthermore, in none of the cases did the losing party attempt to show how violation of a particular principle impacted day-to-day operation of acceptable representation.

The case before this court is different. The Intervenor-Plaintiffs will present evidence that the principles of core retention, compactness, and communities of interest have all been ignored. Furthermore, the Intervenor-Plaintiffs will present evidence, through former Congressman David R. Obey, who represented the Seventh Congressional District for 41 years, that by ignoring these principles the day-to-day operation of fair and effective representation has been damaged by Act 44. (See affidavit of Congressman David R. Obey offered in response to Defendants pending Motion to Dismiss, Dkt. 100.)

II. RELYING SOLELY ON ZERO DEVIATION WILL NOT ACHIEVE FAIR AND EFFECTIVE REPRESENTATION.

The defendants solely rely on the principle of zero deviation..

Q In terms of being legal, what were the legal
23 requirements, as you understood them, that guided
24 what you did?
25 A The -- I'm sorry. I keep interrupting you. One

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1 people, one vote; zero deviation.

(Andrew Speth Dep. 1/17/2012, Dkt. 143, 50:22 to 51:1.)

According to Kevin Kennedy, the Director of the Defendant Government, there are obvious limitations on census data.

3 Q And directing your attention to, I believe,
4 paragraph 8, is it your opinion that historically
5 the census data used by the state legislature or
6 federal three-court panels to draw redistricting
7 maps has been inaccurate and incomplete?

8 A Yes.

9 Q And it is -- Your opinion is based on the
10 following reasons, and I think this refers to
11 paragraphs 9, 10 and 11. A, "the census itself
12 (that is, the counting of people by the Census
13 Bureau) is never entirely accurate. The Census
14 Bureau misses some people during its count." Do
15 you agree with that?

16 A Yes.

17 Q B, "the boundary lines and the geographical maps
18 used by the census are not always accurate. The
19 Census Bureau openly acknowledges this." Do you
20 agree with that?

21 A Yes.

22 Q Paragraph C, "the census is outdated as soon as it
23 is released to the public. In the intervening
24 period between when the census is released and the
25 redistricting maps are drawn by either the state

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1 legislature or federal three-judge panel, as in
2 1982, 1992 and 2002 (which can be almost two years
3 in some cases), some people have moved, other
4 people have died, babies have been born, nonvoting
5 age citizens have become of voting age, and some
6 boundary lines have shifted through annexations."
7 Do you agree with that?

8 MR. HODAN: Counsel, you mean
9 paragraph 11 rather than C?

10 MR. HASSETT: Paragraph 11, yes.
11 I'm sorry.

12 MR. HODAN: You can go ahead and

13 answer.

14 A Yes.

(Kevin Kennedy Dep., 2/8/2012, Dkt. 144, 131:3 to 132:14.)

Nonetheless, census data is the best data available for determining ideal population. However, if zero deviation was the only goal of redistricting there could be numerous different boundaries drawn all showing equal population.

This means that zero deviation cannot be the sole factor used to determine fair and effective representation. In fact, the concepts of core retention, compactness, and communities of interest are probably equal or more important in achieving fair and effective representation. Furthermore, in this case ideal population could probably have been achieved as well the other redistricting principles.

It could be that a valid legislative redistricting plan could be drawn where compactness was sacrificed for some other principle or where other principles were sacrificed to achieve fair and effective representation. However, that was not done in the rush to have this plan adopted. Rather, it was drawn so that a freshman congressman could have more favorable voters in his district.

Q All right. Did you remove Portage County
22 from the Seventh Congressional District at
23 Congressman Duffy's request?

24 A Yes.

25 Q Okay. And that was because Congressman Duffy
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1 wanted to make the Seventh a more Republican
2 district?

3 A Correct.

(Andrew Speth Dep. 1/17/2012, Dkt. 143, 150:21 to 151:3.)

Although this amounts to political gerrymandering, the Intervenor-Plaintiffs do not rely on political gerrymandering as a basis for rejection of Act 44. Rather, Act 44 is unconstitutional

under the equal protections clause since it deprives voters of the Third, Seventh, and Eighth districts of fair and effective representation.

CONCLUSION

The Intervenor –Plaintiffs request an opportunity to show that Act 44 does not achieve fair and effective representation.

Dated this 20th day of February, 2012.

RESPECTFULLY SUBMITTED,

LAWTON & CATES, S.C.

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